



### ISSUES

The Administrative Law Judge awarded claimant permanent partial general disability benefits based upon a thirty-nine percent (39%) work disability and declined to assess any liability of the Award against the Workers Compensation Fund. The respondent and insurance carrier requested the Appeals Board review the finding of Fund liability. That is the sole issue now before this Board.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Workers Compensation Fund bears no liability for this Award.

In March 1992, claimant began experiencing symptoms in his right foot that were ultimately diagnosed as plantar fasciitis. Claimant's symptoms worsened and he first sought medical treatment for the right foot in July 1992 when he saw a physician in a hospital emergency room who gave him a cortisone shot and referred him to a podiatrist. Claimant left work August 10, 1992, when he believed he could no longer continue to work with the pain in his right foot. In December 1992, the insurance carrier referred claimant to orthopedic surgeon, Steven J. Howell, M.D., who prescribed a different type of orthotic, medications, and leg braces. In March 1993, Dr. Howell prescribed a different leg brace which caused claimant to walk with an altered gait. As a result of the altered gait, claimant developed symptomatology in his left foot which was also ultimately diagnosed as plantar fasciitis. In May 1993, Dr. Howell ordered work hardening which caused intense pain in the left foot and increased pain in the right foot. The respondent and insurance carrier admit claimant sustained personal injury by accident arising out of and in the course of his employment with the respondent during the period of March 1992 through August 10, 1992. The respondent and insurance carrier deny claimant aggravated his feet during the work hardening program in May 1993.

The Administrative Law Judge found claimant sustained bilateral plantar fasciitis which constituted a three percent (3%) permanent impairment of function to the body as a whole as a result of his work-related injuries and awarded claimant permanent partial general disability benefits based upon a thirty-nine percent (39%) work disability. In that Award, the Administrative Law Judge declined to assess any liability against the Workers Compensation Fund. Thereafter, the parties entered into a compromised settlement wherein the issue of Fund liability was reserved.

The Appeals Board finds claimant injured his right foot during the period of March 1992 through his last day of work on August 10, 1992. Also, claimant sustained injury when Dr. Howell prescribed a different type of leg brace in March 1993 that altered claimant's gait and caused additional stress and injury to the left foot.

The respondent and insurance carrier contend the Workers Compensation Fund should bear a portion, if not all, of the liability for this Award. The Appeals Board disagrees.

The purpose of the Workers Compensation Fund is to encourage the employment of persons handicapped as a result of mental or physical impairments by relieving employers, totally or partially, of workers compensation liability resulting from compensable accidents suffered by these employees. *Morgan v. Inter-Collegiate Press*, 4 Kan. App. 2d 319, 606 P.2d 479 (1980); *Blevins v. Buildex, Inc.*, 219 Kan. 485, 487, 548 P.2d 765 (1976).

K.S.A. 44-566(b) provides:

“‘Handicapped employee’ means one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed and the handicap is due to any of the following diseases or conditions:

- (15) Loss of or partial loss of the use of any member of the body;
- (16) Any physical deformity or abnormality;
- (17) Any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or in retaining employment.”

An employer is wholly relieved of liability when the handicapped employee is injured or disabled or dies as a result of an injury and the injury, disability or the death probably or most likely would not have occurred but for the preexisting physical or mental impairment. See K.S.A. 1992 Supp. 44-567(a)(1).

An employer is partially relieved of liability when the handicapped employee is injured or is disabled or dies as a result of an injury and the injury probably or most likely would have been sustained without regard to the preexisting impairment but the resulting disability or death was contributed to by the preexisting impairment. See K.S.A. 1992 Supp. 44-567(a)(2).

In either situation, it is the respondent's responsibility and burden to show it hired or retained the handicapped employee after acquiring knowledge of the preexisting impairment. K.S.A. 1992 Supp. 44-567(b) provides:

"In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge. The employer's knowledge of the preexisting impairment may be established by any evidence sufficient to maintain the employer's burden of proof with regard thereto."

An employee, previously injured or handicapped, is not required to exhibit continued disability or to be unable to return to his former job in order to be a "handicapped" employee. Ramirez v. Rockwell Int'l, 10 Kan. App. 2d 403, 405, 701 P.2d 336 (1985). Further, mental reservation on the part of the employer is not required. See Denton v. Sunflower Electric Co-op, 12 Kan. App. 2d 262, 740 P.2d 98 (1987), *aff'd* 242 Kan. 430, 748 P.2d 420 (1988).

The provisions imposing liability upon the Workers Compensation Fund are to be liberally construed to carry out the legislative intent of encouraging employment of handicapped employees. Morgan v. Inter-Collegiate Press, *supra*.

Although provisions imposing liability upon the Workers Compensation Fund are to be liberally construed, the Workers Compensation Act should be interpreted in such a manner to carry out its primary and basic purposes. As indicated above, the Legislature created the Workers Compensation Fund for the basic and primary purpose of

encouraging the employment of impaired individuals. Assessing liability against the Fund in situations where that primary purpose is not furthered is improper.

The Appeals Board finds the respondent did not have knowledge that claimant had an impairment that would constitute a handicap in his obtaining or retaining employment before his last day of work in August 1992. Although he had experienced symptomatology in his right foot since March 1992, claimant did not believe the problem was serious. Even Dr. Howell, the medical expert who the insurance carrier selected to treat claimant beginning in December 1992, testified that claimant had a condition that resolves without residuals in ninety-five percent (95%) of all cases. From a review of the entire record, it appears all parties involved initially believed claimant's foot problem was minor. Based upon the evidence provided, the Appeals Board is unable to find that respondent possessed knowledge that claimant had an impairment that constituted a handicap before his leaving work.

Regarding the respondent's argument that the Fund should be responsible for a portion of the Award because of the subsequent left foot injury, the Appeals Board finds that contention must fail. Liability can only be assessed against the Workers Compensation Fund when an employee sustains a subsequent, compensable injury that arises out of a work-related accident. Because there is no relationship between the subsequent injury and the hiring or retaining the employee in employment, the Workers Compensation Fund is not responsible for the natural and probable consequences or progression of an earlier injury unless it somehow constitutes a subsequent, compensable accidental injury. Likewise, the Workers Compensation Fund is not responsible for an injury occurring during medical treatment when the Fund is not responsible for the work-related injury being treated, because these injuries would have occurred regardless of whether or not respondent retained the employee in its employ.

Because the evidence fails to prove claimant possessed an impairment which constituted a handicap before he left work in August 1992 or that his left foot was injured as a result of a subsequent, compensable work-related accident, the Workers Compensation Fund is not responsible for any portion of the Award entered in this proceeding.

The findings and conclusions of the Administrative Law Judge are adopted by the Appeals Board for this review to the extent they are not inconsistent with the specific findings made herein.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the finding of the Administrative Law Judge pertaining to Fund liability is affirmed; that the Workers Compensation Fund is absolved of liability in this proceeding and that the respondent, Southwestern Electrical Co. Inc., is responsible for the entirety of the Award.

The findings and orders of the Administrative Law Judge and the Special Administrative Law Judge who conducted the settlement hearing in this proceeding on March 30, 1995, are hereby adopted by the Appeals Board for purposes of this review.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August, 1995.

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BOARD MEMBER

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c: Gregory D. Worth, Lenexa, Kansas  
James R. Roth, Wichita, Kansas  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director